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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF FLORIDA

Petitioner

vs.

MICHAEL A. RILEY

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF AIRBORNE LAW ENFORCEMENT ASSOCIATION, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF AMICUS CURIAE OF AIRBORNE LAW ENFORCEMENT ASSOCIATION, INC.

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Parker D. Thomson, Esq., Special Assistant Attorney General, State of Florida, Counsel for the Petitioner, and Marc H. Salton, Esq., Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICUS

AIRBORNE LAW ENFORCEMENT ASSOCIATION, INC. (ALEA) is a professional service organization and is incorporated as a not-for-profit public benefit California corporation. The association has over 1,300 professional members, who are full-time law enforcement pilots or flight support personnel. The association sponsors an annual national training conference, and six regional aircraft safety and air operations seminars each year. Its bimonthly magazine, *Air Beat,* is dedicated to the safe utilization of aircraft for law enforcement purposes, and features various articles on aircraft technology.

Amicus' interest in the instant case arises from our concern that the decision of the court below will unduly hamper the crucial efforts of local, state and federal law enforcement agencies in their aerial surveillance of illegal marijuana crops. As will be demonstrated, aerial surveillance, particularly with the use of helicopters, is the only effective means at the disposal of law enforcement agencies to counter the ever growing problem of illegal domestic marijuana cultivation. We ask this Court to reverse the decision of the Florida Supreme Court in *Riley vs. State of Florida,* 511 So 2d 272 (1987), where the court held that the protection of the Fourth Amendment to the U.S. Constitution and Article I, Section 12 of the Florida Constitution with a reasonable expectation of privacy of activities inside a greenhouse would remain private and out of view of aerial observers. We believe that the Florida high court failed to properly apply this Courts recent holding in *United States vs. Dunn,* 107 S.Ct. 1134, 94 L.Ed. 2d 326, rehearing denied, 107 S.Ct. 1913, 95 L. Ed 2d 519, on remand 817 F.2d 18 (1987) on the issue of what does or does not constitute curtilage and refused to recognize that the sighting of marijuana with the naked eye from a vantage point in the air in which a helicopter had a legal right to be, done in a physically non-intrusive manner did not violate a Fourth Amendment right and therefore no warrant was required before conducting the overflight.

ARGUMENT

I

EFFECTIVE LAW ENFORCEMENT REQUIRES A RULING BY THIS COURT THAT A WARRANTLESS NAKED-EYE AERIAL OBSERVATION OF THE HOME'S CURTILAGE DOES NOT VIOLATE THE FOURTH AMENDMENT

Amicus will not restate to any significant degree the legal arguments developed and presented by the State of Florida in this case. We are in complete agreement with those arguments and wish to discuss important public policy questions raised by the issues in this case, and their importance to the future of airborne law enforcement, particularly, the war against drugs in our society.

The structure which is the subject of this case is a two sided make shift greenhouse from which 44 marijuana plants were seized and was observed by a police officer from a helicopter at approximately 400 feet was described by the trial court as an "outbuilding" located approximately 10 to 20 feet to the rear of the mobile home residence. The structure was enclosed on only two sides and the remaining sides were exposed. The roof was constructed of corrugated roofing. A portion of the roof was translucent and a portion was opaque. Two openings in the roof constituted approximately one tenth of the total roof area. The structure and residence were located on five acres in a rural area.

The Florida Supreme Court concluded that the structure was part of the curtilage and that the respondent Riley exhibited a subjective expectation of privacy in the structure and its contents. This conclusion was based upon the following factors: the opaque portions of the sides and roof, the wire net fence surrounding the five acres and a "DO NOT ENTER" sign posted in front of the mobile home. These facts, the Florida court held, show Riley's subjective expectation that the interior of the structure

would remain shielded from earthbound and aerial observation. That conclusion was made without regard to this Court's opinion in *United States v. Dunn,* _____ U.S. _____, 107 S. Ct. 1134 (1987), decided four months prior to the Riley decision and which enumerated four factors to be considered in determining whether a structure should be considered part of the curtilage.

Amicus submits that the application of the four factors announced in *Dunn* would mandate the finding that the structure should not be considered part of the curtilage. The first factor, the proximity of the structure to the home, is not solely determinative. Here, the structure is ten to twenty feet behind the home. Although, not attached to the residence, the structure cannot be said to be so excessively distant from the home as to be outside the curtilage in a rural area. The other factors must then be considered.

Secondly, although the structure is included within an enclosure surrounding the home, the fence in this case is a perimeter fence surrounding the entire five acres. The residence and out-building were not enclosed by an interior fence which set them apart from the remaining acreage.

The third factor, the nature of the uses to which the area is put, was not addressed by the Florida Supreme Court. Nothing in the photographs admitted into evidence at the suppression hearing or the testimony of Riley or of the police officer suggested that the out-building was used for those "intimate activities of the home" referred to in *Dunn*. Instead, the structure was clearly used for agricultural purposes and its exposed side and roof were intended to facilitate agricultural activity.

Finally, the steps taken by the resident to protect the out-building from observation by outsiders is minimal. The "DO NOT ENTER" sign is more of a warning to potential trespassers than an attempt to conceal the contents o fthe structure from view. The wire net fence surrounding the property is, likewise,

more intended to demark the property line than to prevent observation of the inside area. As this Court observed in *Dunn,* the interior ranch style fences were intended to corral livestock, not to prevent persons from observing what lay inside the enclosed area. Here, the wire net fence did not obscure any view from outside the property.

The holdings of this Court in *Oliver v. United States,* 466 U.S. 170 (1984) and *Dow Chemical Co. v. United States* _____ U.S. _____, 106 S.Ct. 1819 (1986) have made it clear that the Fourth Amendment does not protect open fields from warrantless governmental intrusion. In *Oliver,* this Court reaffirmed the holding of *Hester v. United States,* 265 U.S. 57 (1924), that a person may not legitimately expect privacy for those activities conducted outside except in the area immediately surrounding the home. *Oliver* further permitted a trespass upon open fields as there is no societal interest in protecting activities which occur in areas which are not considered curtilage. As stated in *Oliver:*

> "The test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Oliver,* 466 U.S. at 182-183.

To fall within the open fields doctrine the area "need be neither 'open nor a field' as those terms are used in common speech." *Oliver* at 180, n.11. Amicus submits that in this case, there is a lack of evidence to support the Florida Court's finding that the out-building used to cultivate marijuana should be considered part of the curtilage or that the aerial observation by the deputy infringed upon a personal and societal value protected by the Fourth Amendment.

The Ninth Circuit Court of Appeals dealt with a similar case in *United States v. Broadhurst,* 805 F.2d 849 (9th Cir. 1986). Although, that case involved aerial surveillance from a fixed wing

aircraft at an altitude of not less that 1000 feet, the aircraft repeatedly circled a greenhouse in order to permit viewing of the contents from various angles through the sides of the greenhouse. Nothing was observable through the roof but through the sides, the officers could discern shadows, shapes of plants and shades of green which were consistent with marijuana. The greenhouse was situated in a rural area and the property was surrounded by a barbed wire fence with "No Trespassing" signs. The Ninth Circuit held that since the defendants knowingly exposed the translucent sides of the greenhouse to view from public navigable airspace, there was no intrusion of their privacy rights:

> "What a person knowingly exposes to public view is not protected by the Fourth Amendment." *Broadhurst* at 856 citing *U.S. v. Katz,* 389 U.S. 347, 351 (1967).

Therefore, it is submitted by Amicus that the decision below from the Florida Supreme Court erroneously concluded that the out-building used as a greenhouse falls within the scope of curtilage and is therefore entitled to the protection of the Fourth Amendment from warrantless governmental intrusion.

II

AS A MATTER OF SOUND JUDICIAL POLICY THE RIGHT TO PRIVACY SHOULD NOT APPLY TO POLICE AERIAL SURVEILLANCE FROM A HELICOPTER LAWFULLY OPERATING UNDER FEDERAL AVIATION REGULATIONS.

Amicus' primary focus in this case is centered on the issue of physically non-intrusive surveillance or observation from the air by police of property used to cultivate marijuana. Because the domestic growing of marijuana has reached epidemic proportions like its international counterpart, cocaine, many states and the federal government have engaged in very aggressive marijuana eradication and drug interdiction programs throughout the United States. Drug smuggling, trafficking and street sales of marijuana, and the distribution of other dangerous narcotics in this country represents a social problem that is being given the highest level of enforcement and eradication priority by the highest level of the federal government, i.e. the President and Vice President, as well as, top state law enforcement administrators.

For example, the Texas Department of Public Safety, during the years 1985 to 1987, seized over two million marijuana plants with a street value of nearly $2 billion, through an aerial surveillance program working in cooperation with the Federal Drug Enforcement Administration. Approximately 98% of those seizures were solely the result of initial aerial surveillance by helicopter operating within its authorized navigable airspace, but significantly below 1000 feet above ground level. (These facts are revealed in the letter of April 18, 1988, from Leo E. Gossett, Director, of the Texas Department of Public Safety included in the Appendix of this brief). Such domestic marijuana eradiction programs by law enforcement are essential if there is to be any significant impact on these lucrative but illegal activities.

Law enforcement officials clearly have a legitimate interest in eradicating marijuana cultivation activities. Therefore, the pertinent inquiry is whether the aerial surveillance tactics utilized were unreasonably intrusive or went beyond reasonable efforts to determine if marijuana was being grown in the area[1]. Relevant factors to consider include, among others, the total number of instances of surveillance, the frequency of surveillance. The length of each surveillance, the altitude of the aircraft, the degree of disruption of legitimate activities on the ground, and whether the flight regulations were violated by the surveillance[2]. Apply these consideration to the facts in the instant case, this Court should find no violation of the Fourth Amendment.

Flight levels are federally regulated for both fixed wing and helicopter aircraft to insure air safety within specifically defined navigable airspace[3], that is to say:

> "(29) Navigable airspace" as meaning the airspace above the minimum altitude of flight prescribed by regulation... and shall include airspace needed to insure safety in take off and landing of aircraft."[4]

Under federal rules and regulations, at all times, anywhere, aircraft must maintain an altitude which allows for emergency landing without undue hazard to persons or property on the surface in the event of a power failure[5]. The regulations further establish certain minimum altitudes for fixed winged aircraft with 1000 feet above the highest ground obstacle in congested areas[6],

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[1] *Giancola v. State of W.Va. Dept. of Public Safety* 830 F2d 547,550 (4th Cir. 1987)

[2] Id p. 551

[3] 14 CFR Part 91.79

[4] 49 USC Section 1301(29)

[5] 14 CFR Part 91.79(a)

[6] 14 CFR Part 91.79(b)

or in other than congested areas, an altitude of 500 feet above the surface, except over open water or sparsely populated areas[7]. Helicopters are exempt from either of the two federally regulated minimum flight altitudes that must be maintained by fixed winged aircraft[8]. Given the unique characteristic of a helicopter to perform "autorotation" to safely land the aircraft in the event of a power failure, such maneuver can be accomplished at almost any altitude, without danger to persons or property below, provided the aircraft has sufficient forward air speed[9].

In the instant case, the Sheriff's helicopter was flying at an altitude of 400 feet in a non-congested, rural, area of the county when the pilot and detective observed with the naked eye marijuana plants growing through openings in a greenhouse.

In a 1988 California Appellate Court case with issues that parallel the instant case before this Court, Sabraw, J. in delivering the opinion for the court noted:

> "[i]t *(Ciraolo)*[10] simply pronounced that 'the naked-eye view from navigable airspace does not offend the Fourth Amendment whatever the circumstances of the view' "[11] (parenthetical added)

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[7] 14 CFR Part 91.79(c)

[8] 14 CFR Part 91.79(d)

[9] Hughes Tool Co., Aircraft Div., "Owners Manual for U.S. Army Primary Trainer - Hughes Model TH55A" p. 3-5d figure 3-3 (Height Velocity Diagram). The Hughes TH55A is the type aircraft used by the Pasco Co. Florida Sheriff's Office in the instant case. To insure operational safety and to be able to perform a successful autoration in an emergency, varying airspeed/altitude, combination are required, e.g. 20 kn/400', 40 kn/300', 50 kn/250'

[10] *Calif. v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L. Ed. 2d 210 (1986)

[11] *People v. Romo*, 243 Cal. Rptr. 801, 804 (Cal. App. 1st Dist. 1988), citing *People v. Sabo*, 185 Cal. App. 3d 845, 853, 230 Cal. Rptr. 170 (1986)

"Although the *Ciraolo* Court did state that the plane was in navigable airspace, we do not read the opinion to mean that the case *only* applies to helicopters if they are flying at an altitude of 1,000 feet (emphasis added)."[12]

This Court has upheld the warrantless physically non-intrusive observation of the curtilage of a residence from an aircraft lawfully operating within public navigable airspace.[13]

Although it can be argued that an investigation on private property is certainly an inconvenience to the owner, our concept of ordered liberty requires that all individuals at one time or another give up unrestricted freedom in favor of the safety and welfare of the community. The most obvious example is what appears to be the absolute right of free speech. Despite plain language that it shall not be abridged, this right is modified and limited in many different ways.[14]

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[12] Id

[13] *Calif. v. Ciraolo*, 476 U.S. 207, _____, 106 S.Ct. 1809, 1813, 90 L.Ed.2d 210, _____ (1986)

[14] Libeu, "What is a Reasonable Expectation of Privacy" 12 W.St.U.L.Rev. 849 (1985)

CONCLUSION

Amicus respectfully submits that the decision of the Florida Supreme Court should be reversed on the facts and law, and on the basis of sound judicial policy.

Respectfully submitted,

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April 18, 1988

Mr. Paul J. Marino, Esq.
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Dear Mr. Marino:

Beginning with the 1985 growing season, the Texas Department of Public Safety initiated an aggressive aerial Domestic Marijuana Eradication Program supported by the Drug Enforcement Administration. The following figures show marijuana seizures and values prior to and after this task force was formed:

Task Force	Growing Seasons	Plants Seized	Street Value
Prior To	81-84	78,942	$ 67,100,700
After	85-87	2,262,334	$ 1,922,983,900

Due to it's unique flight characteristics, the helicopter is, by far, the most effective search platform. As a result, approximately 98% of our search efforts are in helicopters. The helicopter's value is that it can safely fly at relatively low altitudes and slow airspeeds in order to conduct such a search.

Our pilots fly their initial search patterns at altitudes anywhere from 400 to 1000 feet AGL. When a suspected, clandestine garden is located, the helicopter allows for a safe, lower altitude approach at about 100 to 400 feet AGL to confirm that the plants observed are in fact marijuana. We have found this low altitude capability of the helicopter to be essential to an effective eradication program.

If you need additional information concerning our eradication program, please feel free to call.

Sincerely,

Leo E. Gossett
Director

LEG:Sld